IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 300 of 1988

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GUJARAT HOUSING BOARD - Appellant(s)

Versus

PATEL AND PATEL A FIRM & 1 - Defendant(s)

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Appearance :

MR. Y.F. MEHTA for Appellant(s) : 1,
NOTICE SERVED for Defendant(s) : 1,
MR. A.C. GANDHI for Defendant(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 07/12/2005

ORAL JUDGMENT

This appeal arises out of a judgment and decree rendered by the learned Judge, Presiding Court no.5 of the City Civil Court at Ahmedabad on 21/2/1986 in Civil Suit No.1396 of 1980.

2.A suit came to be filed by respondent No.1 – herein against the present appellant and Indian Overseas Bank, who are joined as defendant Nos.1 and 2 respectively. The suit was basically for a declaration that the action of defendant No.1 in demanding the payment of money in terms of bank guarantee from defendant No.2 is illegal and invalid, alongwith a prayer for permanent injunction restraining defendant No.1 from encashing the said bank guarantee to the extent of Rs.85,200/- for realization of the demand of Rs.50,100/-. An injunction was also sought against defendant No.2 restraining them from paying Rs.50,100/- out of the guarantee amount.

2.1The above referred prayers were made by the plaintiff on the ground that the contract work could not be completed, as the appellant, defendant No.1 had committed breach of certain conditions to the contract. On the other hand it was the case of the appellant – defendant No.1 that the progress was not satisfactory and, therefore, a communication was addressed on 8/4/1980, claiming from the Contractor, an amount of Rs.4,600/- by way of compensation (penalty) for period between 15/6/1979 and 29/2/1980. Again, by

communication dated 24/4/1980, a compensation in sum of Rs.45,500/- in all was demanded for period between 1/3/1980 to 31/3/1980 @ Rs.500/- per day and for period from 1/4/1980 to 30/4/1980 @ Rs.1000/- per day. Again, by letter dated 25/4/1980, defendant No.1 called upon by defendant No.2 to pay Rs.50,100/- out of the bank guarantee amount of Rs.85,200/- furnished by the Contractor by way of security deposit and the contractor, therefore, filed the suit challenging the said action, seeking injunction.

2.2The case of the defendant No.1, appellant herein, on the other hand is that defendant No.2 as a bank; having issued bank guarantee is bound to honour the same. It was also the case of the appellant – original defendant No.1 that no breach is committed by it. The breach is at the hands of plaintiff – contractor and, therefore, he is liable to pay to defendant No.1, the amount as demanded and therefore, suit may be dismissed.

3.The trial Court framed issues as under.

(1)Does the plaintiff prove that the action of defendant No.1 in calling for the payment of the bank guarantee from defendant No.2 is illegal and

invalid ?

(2)Does the defendant prove that the suit is hit by section 71 of the Gujarat Housing Board Act, 1961 ?

(3)What relief or reliefs, if any, is the plaintiff entitled to claim in this suit ?

(4)What final order and decree ?

4.The findings on the issues by the trial Court are as under:

(1)In the affirmative.

(2)In the negative.

(3)As per the final order.

(4)As per the final order.

5.Ultimately, the suit came to be decreed and it was declared that action on part of defendant No.1 i.e. the appellant in enforcing the bank guarantee by calling upon defendant No.2 to make payment of the bank guarantee amount, is illegal and invalid and injunction was granted against encashment of the bank guarantee.

6. The trial Court after considering the documentary evidence led by the parties (incidentally no oral evidence was led by either side) came to a conclusion that the bank guarantee cannot be enforced as there is dispute in respect of breach of conditions or want of compliance of the contract.

7. Heard, learned Advocate, Mr.Y.F.Mehta for the appellant – original defendant No.1 and Mr.A.A.Gandhi for original defendant No.2. Respondent No.1, though having been served with notice, has chosen not to contest this appeal.

8. The question that this Court is required to address is whether the trail Court was right in granting injunction against encashment of bank guarantee on ground of dispute as to alleged breach of contract and in absence of any allegation of fraud etc..

9. This question is now well settled by the decision in case of **Federal Bank Ltd. Vs. V.M.Jog Engineering Ltd and Others reported in 2001 (1) SCC 663**; where it has been held that in case of bank guarantee or a letter of credit, the Court should not issue injunction

restraining encashment thereof on ground of breach of main contract between the parties. Because, the bank guarantee or the letter of credit is an independent contract from the main contract. The Court also held that only exceptions are when fraud is committed or where the encashment may result in an irretrievable damage. None of these aspects are found in the present case undisputedly. If pleadings are seen, there is not even a whisper on either fraud or irretrievable damage. Under the circumstances, the trail Court committed an error in granting injunction against encashment of bank guarantee. As a result, appeal deserves to be allowed.

10.It transpires that subsequent to the decree, respondent No.1 has deposited fixed deposit (Term deposit) receipts with the appellant in light of order passed by this Court in Civil Application No.560 of 1988 on 5/9/1989 and as such, appellant's interest is taken care of. So far as respondent No.2 is concerned, the bank guarantee is not renewed any more and as such, there is no existing contract of bank guarantee. Under the circumstances following order.

i)The judgment and decree is hereby set aside.

ii)The fixed deposits lying with the appellant would

be treated as bank guarantee and it would be open for the appellant to appropriate the same towards its dues surplus, if any shall be paid to respondent No.1 – original plaintiff.

iii)There shall be no order as to costs.

(A.L.DAVE, J.)

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